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A Thorn in the Side of Privacy: The Need for Reassessment of the Constitutional Right to Abortion

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A THORN IN THE SIDE OF PRIVACY: THE NEED FOR REASSESSMENT OF THE CONSTITUTIONAL RIGHT TO ABORTION

INTRODUCTION

The right to obtain an abortion is a subject which was not specifically addressed in the original framing of the Constitution. The Supreme Court has, therefore, searched beyond the explicit, written text of the Constitution in abortion cases, basing decisions on penumbral rights[1] formed by emanations from specific guarantees in the Bill of Rights, and the finding that certain values are "fundamental."[2] However, this fleshing out of the constitutional framework has created problems for the Court which are not limited to the moral aspects of abortion alone.

In the controversial decision of *Roe v. Wade*,[3] the finding of a qualified right to obtain an abortion, based on a fundamental right of personal privacy, strongly divided the Supreme Court. *Roe*'s expansion of the scope of existing constitutional rights fed a growing theoretical dispute concerning the proper role of the judiciary, as a non-electorally accountable branch of the government,[4] in interpreting the Constitution. The changing judicial scrutiny standards the Court has

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1. A "penumbra" is "a surrounding or adjoining region in which something exists in a lesser degree; a marginal area." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1673 (P. Gove ed. 1961). Use of the term "penumbral" as linked to the inferred fundamental constitutional right of privacy originated in the 1965 case of Griswold v. Connecticut, 381 U.S. 479 (1965).

2. The strict scrutiny of regulations affecting marriage and procreation under a fundamental rights analysis was first discussed in Skinner v. Oklahoma, 316 U.S. 535 (1942).

3. 410 U.S. 113 (1973).

4. A primary problem constitutional theorists have with the active position the Court has taken in the area of abortion is that the Court is rendering decisions affecting the shape of state and federal legislation. However, the judicial branch is not directly controlled by, nor accountable to, the people (unlike the legislative and executive branches which are elected offices). A complete discussion of various theories of the proper limits of constitutional review is beyond the scope of this Comment. For a general overview of contemporary interpretational theories, see Chemerinksy, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984).

used to analyze subsequent abortion cases reflect this increasing schism, both within and outside of the Court.

In the latest of the Supreme Court's decisions on abortion, *Thornburgh v. American College of Obstetricians & Gynecologists*,[5] the Court attempts to clarify earlier theoretical and procedural pronouncements made concerning state abortion regulations. *Thornburgh* reexamines the scope of penumbral constitutional rights and the use of substantive due process scrutiny rationales as they relate to abortion issues. The case also provides important insights concerning how Justices' individual theories about substantive due process have influenced the Court's decisions regarding abortion.

This Comment examines the historical background of abortion issues prior to *Thornburgh*, briefly outlining the development of legal precedents concerning abortion legislation, and noting the changing standards of judicial scrutiny applied by the Court. Next, an overview of the *Thornburgh* decision is presented, focusing on the means by which the Justices supported answers to the constitutional issues raised in this case. Thereafter, the impact created by the scrutiny standards used in *Thornburgh* on the scope of the abortion right is analyzed. Finally, a proposal for scrutiny of future abortion issues is advanced, drawing from the various substantive and procedural concepts used by the Justices in this case.

I. HISTORICAL BACKGROUND

A. The Penumbral Right of Privacy

The source of the contemporary constitutional right of privacy, upon which the right to an abortion has been based, is derived primarily from a line of cases interpreting the landmark decision *Griswold v. Connecticut*.[6] In *Griswold*, the Court held that a state statute which prohibited even married couples from using contraceptives was unconstitutional.[7] To support this holding, the Court articulated a penumbral right of privacy, implied from "zones" of expressly enumerated clauses of the first, third, fourth, fifth and ninth amendments

5. 106 S. Ct. 2169 (1986).
6. 381 U.S. 479 (1965).
7. *Id.* at 485-86.

to the Constitution.[8] A "strict scrutiny" standard of review was applied[9] because the Court found that this "zone" of privacy included those rights and liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and that these substantive "fundamental" rights were protected from unreasonable state action through the due process clause of the fourteenth amendment.[10]

This use of a more stringent scrutiny differed greatly from post-New Deal case law concerning state economic regulations in which a "rational basis" test was used. Under a rational basis test, only the rational relationship between the means of regulation used by the state and the legitimate, facial objectives of the state legislation was examined.[11] In *Griswold*, instead of applying minimal, rational basis scrutiny, the Court overturned statutes because the government failed to prove that its regulation of the constitutionally protected zone of privacy was not made "by means which sweep unnecessarily broadly."[12] The Court suggested that economic regulation of the manufacture or sale of contraceptives would have

8. *Id.* at 484. For the original articulation of contemporary right of privacy concepts, see Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (recognizing the "right to be let alone" as the "most comprehensive of rights and the right most valued by civilized man").

9. "Strict scrutiny" review recognizes that when a personal right at issue is so essential to individual liberty in our society as to be ranked "fundamental," the Court will make a more probing review of legislative action, requiring that the means chosen to accomplish the state purpose be specifically and narrowly drawn, and placing the burden of proving the necessity of a regulation on the government. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 426-31 (1983) (describing the strict scrutiny test as applied to abortion issues).

10. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

11. Since 1937, when President Roosevelt attempted to implement his "Court-packing" plan to check judicial substantive due process invalidation of federal programs, Supreme Court deference to economic legislation has markedly increased. The Court almost totally abandoned scrutiny of economic regulations in post-New Deal cases, finding a need only that legislation be facially related to any legitimate end of government. The Court has not overly concerned itself when such laws incidentally served other purposes, and has placed the high burden of proof that a regulation was purely arbitrary on the challenging party. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); United States v. Carolene Products Co., 304 U.S. 144 (1938); *see generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 443-51 (2d ed. 1983).

12. *Griswold*, 381 U.S. at 485.

achieved state goals without impinging on the constitutionally protected marital relationship.[13]

In *Eisenstadt v. Baird*,[14] the Court overturned a statute prohibiting distribution of contraceptives to unmarried persons. The language used in this decision broadened the right of privacy, indicating that the right was not contingent on marital status, as *Griswold* might have suggested.[15] The *Eisenstadt* Court further found the statutes it examined had an impermissible purpose of opposing contraception per se,[16] illustrating the Court's willingness to look beyond the face of the statute when a "fundamental" right is impacted.

B. The Right to Obtain an Abortion

Relying on the penumbral right of privacy developed in *Griswold* and *Eisenstadt*, the 1973 decision of *Roe v. Wade*[17] marked a major advance in the broadening scope of the personal privacy right. In *Roe*, the Court relied on the concept of "personal liberty embodied in the Fourteenth Amendment's Due Process Clause" to support a general, "fundamental" right of "personal privacy" broad enough to encompass the controversial choice of a woman, with her physician's guidance, to end a pregnancy.[18] Strict scrutiny of state regulations was made in *Roe*, but a novel sliding scale test was used to establish compelling state interests in maternal health and the "potentiality of life" of the fetus.[19] These interests grew in importance as the pregnancy progressed and were to be balanced by the qualified right to obtain an abortion.

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13. *Id.*

14. 405 U.S. 438 (1972).

15. In *Eisenstadt*, the Court stated: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis in original). *See also* Mott & Mott, *Property and Personal Privacy: Interrelationship, Abandonment and Confusion in the Path of Judicial Review*, 18 J. MARSHALL L. REV. 847, 860 (1985).

16. *Eisenstadt*, 405 U.S. at 450-52.

17. 410 U.S. 113 (1973).

18. *Id.* at 153. The Court in *Roe* neither accepted nor rejected the argument adopted by the lower court that the ninth amendment provided a basis for constitutional protection of the abortion decision.

19. *Id.* at 162.

Under the analysis developed by Justice Blackmun, virtually no state regulation of the decision to have an abortion could be made during the first trimester of pregnancy. The interest in protecting maternal health by regulation of medical processes used in an abortion was held to be compelling from approximately the time of the second trimester. The state interest in protecting the fetus was established as compelling at the time the fetus was determined to be "viable," that is, having the "capability of meaningful life outside the mother's womb."[20] The broad interpretation of constitutional guarantees made by the Court in justifying *Roe* generated immediate commentary by constitutional law scholars who questioned not only the morality of this decision, but also the validity of the rationale and results reached by the Court.[21]

In the companion case to *Roe*, *Doe v. Bolton*,[22] the Court found mandatory hospitalization requirements and hospital committee review of a physician's approval for a woman to receive an abortion constitutionally unjustifiable.[23] In addition to invalidating these procedural provisions, the Court also overturned substantive language of Georgia statutes which required a two-physician confirmation of the attending doctor's recommendation. The decision left only a requirement that a physician's "best clinical judgment" be exercised in determining the necessity of an abortion.[24]

Doe sustained the constitutionality of statutes relating to the "manner" of performing abortions based on a finding of compelling state interest in protecting a "*potential* of independent human existence."[25] This "potentiality" language in *Roe* and *Doe* formed the foundation for later dissenting opinions seeking to limit accessibility of abortions by focusing

20. *Id.* at 163; *see also id.* at 164-65 (overview of trimester system).

21. *See, e.g.*, *Roe*, 410 U.S. at 171-78 (Rehnquist, J., dissenting); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. For a discussion of the general history of abortion law, see Special Project, *Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 73-127.

22. 410 U.S. 179 (1973).

23. *Id.* at 193-98.

24. *Id.* at 199.

25. *Id.* at 187 (quoting Doe v. Bolton, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970) (per curiam) (emphasis in original)).

on the importance of state interests, rather than on the personal right to obtain an abortion.

C. *The Parameters of the Abortion Right*

Having established a qualified right to abortion, the Court thereafter was compelled to define its scope. In a subsequent line of decisions, three major areas were explored: statutes which required the consent of persons other than the woman seeking an abortion; restrictions on government funding of abortions; and regulation of the medical procedures used in abortions. While a majority of Justices confirmed the right to obtain an abortion in these cases, two important trends developed. First, in upholding certain regulations, a less rigorous scrutiny test was applied. Second, dissenting opinions grew increasingly more elaborate in examining the underlying concept of *Roe* that the right to choose abortion is "fundamental."

1. Consent Regulations

Statutes requiring consent of relatives before a woman could have an abortion have consistently been overturned by the Court where absolute veto power over the woman's decision was created. In *Planned Parenthood v. Danforth*,[26] the requirement of approval of a woman's spouse or of the parents of a minor before a first-trimester abortion could be obtained was held unconstitutional.[27] These blanket consent provisions were strictly scrutinized since they affected a woman's decision-making process itself.

The Court was less cohesive in its justification of consent requirements when refining its position regarding minors seeking abortions. In *Bellotti v. Baird*,[28] for example, a bare majority with two concurrences struck down parental veto provisions. The Court held that if a state required parental consent to a minor's abortion, an alternative procedure was also required whereby a minor would be given the opportunity to convince a judge either that she was "mature and well

26. 428 U.S. 52 (1976).

27. *Id.* at 67-75.

28. 443 U.S. 622 (1979) (also known as *Bellotti II* to distinguish it from an earlier procedural ruling in the same case, Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*)).

enough informed to make intelligently the abortion decision" or that "the desired abortion would be in her best interests."[29] Upon satisfying a court of this, the court could authorize the minor to act without parental consultation or consent.

The ruling in *Bellotti* was based on an altered standard of review: the consent statute was considered unconstitutional because it "impose[d] an undue burden upon the exercise by minors of the right to seek an abortion."[30] This adoption of an apparently less stringent constitutional standard was purportedly based on the holding in the earlier *Danforth* decision. It should be noted, however, that *Danforth* applied a strict scrutiny review in striking down blanket consent provisions.[31]

Another facet of consent regulation was delineated in *H.L. v. Matheson*,[32] which upheld a statute requiring the physician of an immature, unemancipated minor merely to notify the minor's parents of her decision to obtain an abortion, rather than requiring parental consent. The majority opinion in *Matheson* used strict scrutiny language in upholding this statute.[33] However, the acceptance of a notice requirement which might "inhibit some minors from seeking abortions" marked a shift from intense review of state regulations, as did the finding that "[t]he Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions."[34]

2. Funding Regulations

In deciding cases involving government funded abortions, the Court shifted its analytical framework, using minimum scrutiny, rational basis justifications. In the earliest case raising the issue, *Maher v. Roe*,[35] state refusals to fund non-therapeutic, abortions were upheld. The *Maher* Court justified its use of the deferential rationality standard by distin-

29. 443 U.S. at 647.

30. *Id.*

31. Under the "unduly burdensome" test, only outright prevention of a woman's decision to terminate a pregnancy receives strict scrutiny; all regulations which limit access to abortion once that choice has been made are examined only for a rational relationship to state interests. *See* Harris v. McRae, 448 U.S. 297, 314 (1980); Maher v. Roe, 432 U.S. 464, 473 (1977); *Bellotti*, 428 U.S. at 147.

32. 450 U.S. 398 (1981).

33. *Id.* at 404-05.

34. *Id.* at 413.

35. 432 U.S. 464 (1977).

guishing unconstitutional impingement of the right to choose abortion from the lack of an affirmative obligation on the part of the state to fund such a choice under the equal protection clause of the fourteenth amendment.[36] Justice Powell's determination that a state may "make a value judgment favoring childbirth over abortion" and may make "childbirth a more attractive alternative"[37] than abortion were strongly renounced by the minority in *Maher*, which found the state funding regulations coercive and stressed the fundamental right, strict scrutiny analysis.[38]

This funding exception to the Court's general prohibition of restrictions on access to abortion was further broadened in *Harris v. McRae*.[39] In *Harris*, the Court affirmed federal Medicaid funding limitations established under the Hyde Amendment of the Social Security Act, which curtailed payment even for medically necessary abortions, and found that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."[40]

The deliberate failure in these funding cases to find substantive due process violations is consistent with the Court's post-New Deal reluctance to oppose legislative decisions concerning economic matters.[41] This line of cases consistently avoided imposing affirmative financial obligations on the government but further blurred the appropriate scrutiny and scope of the right to obtain an abortion.[42]

3. Medical Procedure Regulations

In examining the regulation of medical procedures used in performing abortions, strict scrutiny rationale was most consistently applied by the majority and most openly criticized by dissenters. As a general rule, those regulations which were

36. *Id.* at 469-71.
37. *Id.* at 474.
38. *Id.* at 482-90.
39. 448 U.S. 297 (1980).
40. *Id.* at 316.
41. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 443-61 (2d ed. 1983).
42. *See Harris*, 448 U.S. at 329-57 (dissenting opinions of Justices Brennan, Marshall and Stevens).

found to unduly restrict a woman's ability to obtain an abortion were held unconstitutional. Provisions which merely regulated aspects of the medical process without curtailing or making it unreasonably difficult to obtain an abortion were upheld.

Among early medical procedure statutes examined was a provision in *Danforth* prescribing the physician's duty of care in abortions, which was held unconstitutional for failure to provide varying degrees of care depending on the trimester of pregnancy.[43] The Court also examined, but upheld, a general requirement in *Danforth* that the informed consent of a woman seeking an abortion be obtained in writing, without defining precisely what information should be given to each patient prior to consent.[44] Confidential recordkeeping requirements "used only for statistical purposes" were also approved.[45]

In the 1979 decision of *Colautti v. Franklin*,[46] a criminal statute regarding special physician care of a "viable" fetus was held impermissibly vague.[47] The majority found that it was unclear whether the statute, which provided that a physician use a method offering the "greatest possibility" of fetal survival,[48] required a " 'trade-off' between the woman's health and . . . fetal survival,"[49] and therefore found it unconstitutional. In his dissent to *Colautti*, Justice White emphasized the state interest which arose under *Roe* when the fetus was "potentially able to live outside the mother's womb, albeit with artificial aid," and criticized the majority for substantially curtailing state power to protect fetal life.[50]

The most recent framework for analyzing medical practice requirements was developed in a trilogy of cases decided in 1983, all dealing, in part, with statutes requiring hospitalization for second trimester abortions. The decisons in *Planned Parenthood Association v. Ashcroft*[51] and *Simopoulos v. Vir-*

43. 428 U.S. at 81-84.
44. *Id.* at 67 n.8.
45. *Id.* at 79.
46. 439 U.S. 379 (1979).
47. *Id.* at 390-97.
48. *Id.* at 397-401.
49. *Id.* at 400.
50. *Id.* at 401-07, 409.
51. 462 U.S. 476 (1983).

ginia[52] applied holdings developed in the companion case of *City of Akron v. Akron Center for Reproductive Health, Inc.*,[53] thereby serving the same supportive and illustrative function as *Doe* had for the concepts developed in *Roe*.[54] The six person majority in *Akron* used the opportunity in reviewing statutory abortion requirements to bolster *Roe*'s finding of a fundamental privacy right, which included the right to choose abortion, and to move away from the "unduly burdensome" standard suggested in earlier consent and funding cases.[55]

In *Akron*, a second trimester hospitalizaton requirement was found to be based properly on a compelling state interest in maternal health, but was not "reasonable" when taking into consideration improved medical techniques and women's need for a "relatively inexpensive, otherwise accessible, and safe abortion procedure."[56] Also rejected by the majority were provisions dealing with informed consent and written parental consent for minors. Unlike the general provisions approved in *Danforth*, the Court found that the graphically-detailed information in the Ohio statutes,[57] required to be conveyed by the

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52. 462 U.S. 506 (1983).

53. 462 U.S. 416 (1983).

54. The constitutionally-permissible scope of hospitalization provisions defined in *Akron* was further developed in both *Ashcroft* and *Simopoulos*. The Missouri statutes in *Ashcroft* were overturned because they imposed an absolute requirement of second trimester hospitalization, while the Virginia statutes reviewed in *Simopoulos* were upheld because they did not require that abortions be performed exclusively in full-service hospitals. *Ashcroft*, 462 U.S. at 481-82; *Simopoulos*, 462 U.S. at 510-19. This application of a general rule to specific circumstances is similar to the treatment of the scope of the trimester system developed in *Roe*, which was illustrated in *Doe*. For additional discussion of *Akron*, *Ashcroft* and *Simopoulos*, see Ford, *The Evolution of a Constitutional Right to an Abortion*, 4 J. LEGAL MED. 271, 307-22 (1983).

55. *Akron*, 462 U.S. at 426-31.

56. *Id.* at 438.

57. The Court found particularly objectionable that the description of the unborn child's characteristics "must include, but not be limited to, 'appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.' " *Akron*, 462 U.S. at 444 n.34. The statutes further required the physician to state:

> [A]bortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

Id. at 445 n.35.

woman's physician regardless of relevancy, and the imposition of a twenty-four hour waiting period from the time a woman consented until an abortion could be performed, were "designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[58]

In her dissent in *Akron*, Justice O'Connor called for a major revision of the trimester framework adopted in *Roe*. She advocated use of the "unduly burdensome" standard "throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved."[59] While retaining the determination that the right to obtain an abortion is "fundamental," she found the nature of that right had been substantially limited by subsequent abortion cases.[60] These limitations, she concluded, warranted use of deferential treatment, requiring only that a state regulation bear a rational relationship to a legitimate state interest, unless the state regulation "heavily burdened" a woman's right, whereupon a heightened scrutiny test was appropriate.[61] She further criticized the "potential human life" standard as arbitrary, inaccurate and erroneously tied to the viability of the fetus.[62] Under her two-step test, all of the *Akron* statutes would have been upheld because she determined that they created no undue burden on constitutional rights and were rationally related to compelling state interests in preserving the life and health of the mother.[63]

The majority in *Akron* was able to reaffirm *Roe*'s fundamental rights analysis, thereby limiting the scope of deferential review used in earlier consent and funding cases. However, the standards established in *Akron* mark the delineation of two distinct scrutiny schemes: strict scrutiny, used to overturn statutes which curtail the ability to choose an abortion, and deferential review, which, even when moving

58. *Id.* at 444.

59. *Id.* at 453.

60. *Id.* at 461 n.8. Justice O'Connor relied predominately on the line of funding cases beginning with *Bellotti*, and on Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977), which overturned a statute barring the sale of contraceptives to minors and used language that implied the "unduly burdensome" test.

61. *Akron*, 462 U.S. at 462.

62. *Id.* at 461.

63. *Id.* at 466-75.

beyond rationality to heightened scrutiny because of the presence of an "undue burden," accord great weight to legislative enactments. These broad tests used in *Akron* were to become the primary support for both majority and dissent in the latest decision by the Supreme Court on medical procedure regulations, *Thornburgh v. American College of Obstetricians and Gynecologists*[64]

II. THE *THORNBURGH* DECISION

A. Procedural History

In *Thornburgh v. American College of Obstetricians and Gynecologists*,[65] the constitutionality of provisions of the Pennsylvania Abortion Control Act of 1982 were challenged. The plaintiffs were physicians, clergy, abortion counselors and others having related health care concerns. The action was brought under 42 U.S.C. sec. 1983, seeking declaratory relief and preliminary injunctive enforcement of the entire Act.[66] Addressing plaintiffs' motion for injunction, heavily substantiated by affidavits of both parties and a stipulation of uncontested facts,[67] the District Court for the Eastern District of Pennsylvania preliminarily enjoined only a single portion of the statutes which required a twenty-four hour waiting period between obtaining a woman's informed consent and the actual performance of an abortion.[68] Both parties appealed this decision.

The Court of Appeals for the Third Circuit overturned the district court decision on injunction, enjoining enforcement of the entire Act pending appeal.[69] Based on decisions rendered shortly thereafter by the Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[70] *Planned*

64. 106 S. Ct. 2169 (1986), *aff'g*, 737 F.2d 283 (3d Cir. 1984), *rev'g and remanding*, 552 F. Supp. 791 (E.D. Pa. 1982).

65. 106 S. Ct. 2169 (1986).

66. American College of Obstetricians and Gynecologists v. Thornburgh, 552 F. Supp. 791, 793-94 (E.D. Pa. 1982).

67. American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 289 (3d Cir. 1984).

68. *Thornburgh*, 552 F. Supp. at 797-98, 811.

69. *Thornburgh*, 737 F.2d at 290.

70. 462 U.S. 416 (1983).

Parenthood Assoc. v. Ashcroft[71] and *Simopoulos v. Virginia*,[72] the court of appeals addressed the merits of each statutory provision separately on full rehearing and found a number of statutory provisions unconstitutional.[73] Petition for rehearing en banc was denied,[74] and the state sought appeal to the Supreme Court pursuant to 28 U.S.C. sec. 1254(2).[75]

B. Majority Opinion

Justice Blackmun, writing for a majority of five Justices in *Thornburgh*, found that states are not free to enact legislation "under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."[76] Under this broad proscription, the Supreme Court found all the Pennsylvania statutory provisions at issue unconstitutional. In order to arrive at this substantive ruling, which affirmed the general principles established in *Roe v. Wade*[77] and *Akron*, the Court made several preliminary findings which do not follow customary appellate procedure.

First, the Court approved the unusual action taken by the Third Circuit Court of Appeals, which had ruled on the constitutionality of the Pennsylvania statutes rather than simply reviewing the district court's denial of the plaintiff's motions for injunction. The Supreme Court reasoned that there was some limited precedent for such an action[78] and that cases decided by the Supreme Court during the pendency of the ap-

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71. 462 U.S. 476 (1983).

72. 462 U.S. 506 (1983).

73. *Thornburgh*, 737 F.2d at 303-04.

74. *Id.* at 316.

75. *Thornburgh*, 106 S. Ct. at 2175. Section 1254(2) provides: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: . . . (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."

76. *Id.* at 2178.

77. 410 U.S. 113 (1973).

78. *Thornburgh*, 106 S. Ct. at 2176 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Supreme Court addressing merits of wartime seizure of the nation's steel mills by the Secretary of Commerce on case appealed only as to Court of Appeals' stay of injunction)). The Court in *Thornburgh* further noted: "That a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power."

peal to the Third Circuit definitively resolved many constitutional issues which were raised.[79]

The Court then ruled that, although the judgment below was not "a final judgment in the ordinary meaning of that term,"[80] the "full record" before the court of appeals allowed the Supreme Court to proceed to plenary review of the statutes.[81] In doing so, the Court relied on a grant of certiorari rather than the statutory appellate jurisdiction found in 28 U.S.C. sec. 1254(2),[82] the means by which the parties had originally sought review.

The Court then analyzed the constitutional issues presented by six statutory provisions not otherwise disposed of by the lower courts.[83] Affirming the fundamental nature of the right to abortion established in *Roe*, the majority applied a strict scrutiny test and found all six provisions unconstitutional. Justification for this holding was discussed in three sections which examined: 1) requirements concerning informed consent[84] and the distribution of specific printed information to all women seeking an abortion,[85] 2) detailed reporting requirements[86] concerning statistical information about each woman obtaining an abortion, which included a "viability determination"[87] of the fetus made by the physician, and 3) provisions regarding the degree of care a physician must exercise in post-viability abortions,[88] as well as a requirement that a second physician be available during the abortion to care for a viable fetus.[89]

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79. *Thornburgh*, 106 S. Ct. at 2177.

80. *Id.* at 2175.

81. *Id.* at 2176-77.

82. The Court ruled that "where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under sec. 1254(2)." *Id.* at 2175-76.

83. For ease of reference, the statute sections of each provision of the Pennsylvania Abortion Control Act of 1982 are not used in the text; reference to appropriate sections is made in notes 81-86 *infra*. *See also Thornburgh*, 737 F.2d at 304-12 (appendix setting forth full text of all relevant portions of the Abortion Control Act).

84. 18 PA. CONS. STAT. ANN. § 3205 (Purdon 1983).

85. *Id.* § 3208.

86. *Id.* § 3214(a) & (h).

87. *Id.* § 3211(a).

88. *Id.* § 3210(b).

89. *Id.* § 3210(c).

The sections dealing with informed consent and distribution of printed information were determined to be inappropriate at two levels. Facially, the statutes were criticized because they required a fixed and extensive body of information to be conveyed, irrespective of the particular needs of the patient.[90] Furthermore, the Court found that this information was designed not to " 'inform the woman's consent but rather to persuade her to withhold it altogether.' "[91] Thus, both the motive for and means of legislation were held to be impermissibly overbroad. The Court found that the printed materials were "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."[92]

In assessing reporting requirements, which included the basis of the determination made by the physician of "fetal viability," the Court held that the statutes were facially impermissible because they made detailed reported information available for public inspection.[93] The Court found that, unlike

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90. *Thornburgh*, 106 S. Ct. at 2178-79.

91. *Id.* at 2179 (quoting City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 444 (1983)). *See supra* note 57 for information required to be conveyed under *Akron*'s statutes. Section 3208 of Pennsylvania's Abortion Act, "Printed Information," contained, in addition to geographically indexed information concerning agencies available to assist a woman through pregnancy, the statement:

> There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

18 PA. CONS. STAT. ANN. § 3208(a)(1) (Purdon 1983). Also to be included were:

> [m]aterials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival. The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

Id. at § 3208(a)(2).

92. *Thornburgh*, 106 S. Ct. at 2179.

93. The report required by §§ 3214(a) and (h) was detailed and included, among other things:

> [i]dentification of the performing and referring physicians and of the facility or agency; information as to the woman's political subdivision and State of resi-

the statistical reporting upheld in *Planned Parenthood v. Danforth*,[94] "[i]dentification is the obvious purpose of these extreme reporting requirements,"[95] and concluded this provision might "chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular activities."[96] As a whole, the reporting provisions were found to be an unacceptable danger, raising the "spectre of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy."[97]

Finally, the Court examined two requirements for physicians performing post-viability abortions. The court of appeals had ruled that the statute concerning a physician's degree of care of a viable fetus was unconstitutional because it required a "trade-off" between the health of a woman seeking an abortion and fetal survival, when maternal health was to be the physician's paramount concern.[98] The Supreme Court agreed that the statute, as construed by the court of appeals, was susceptible of a construction which required the woman seeking an abortion to bear an increased medical risk, and therefore upheld the decision that the statute was facially invalid.[99]

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dence, age, race, marital status, and number of prior pregnancies; the date of her last menstrual period and the probable gestational age; the basis for any judgment that any medical emergency existed; the basis for any determination of non-viability; and the method of payment for the abortion.

Id. at 2181.

94. 428 U.S. 52 (1976).

95. *Id.* at 2182.

96. *Id.*

97. *Id.*

98. *Id.* at 2182-83.

99. *Id.* at 2183. The text of section 3210(b) reads:

Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the

The Court also invalidated Pennsylvania's "second physician" requirement. This provision was similar to a Missouri statute examined in *Ashcroft*, in which a second physician was required to be present at abortions to care for a fetus which had been determined to be viable. The "second physician" provision in *Ashcroft* was held constitutional because the Court had found an implied exception to the law when a second physician could not be immediately available during a medical emergency.[100] In *Thornburgh*, however, the Court found that the legislature intentionally failed to provide a medical emergency exception to the second physician requirement, thus creating a constitutionally impermissible danger to a woman's life and health, and potentially chilling the performance of late abortions.[101]

The majority opinion concluded with a strong reiteration that the decision to have an abortion is included within the private sphere of "individual dignity and autonomy" and that "[a] woman's right to make that choice freely is fundamental."[102]

C. *Stevens' Concurrence*

Justice Stevens' concurrence did not specifically address the constitutionality of the Pennsylvania statutes. Instead he examined the scope of an individual's liberty interest, which he found included a woman's ability to choose an abortion. Holding that the right to an abortion was indeed a "fundamental" aspect of "individual autonomy,"[103] and that strict scrutiny review is appropriate where such a finding is made, Stevens criticized Justice White's use of minimal scrutiny as a basis of review. Stevens noted the contradiction arising from White's citation to case law in his dissent in *Thornburgh* which affirmed the right to an abortion as "fundamental."[104] Stevens, therefore, concluded that White should have used

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mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree.

18 PA. CONS. STAT. ANN. § 3210(b) (Purdon 1983).

100. *Ashcroft*, 462 U.S. at 485 n.8.

101. *Thornburgh*, 106 S. Ct. at 2183-84.

102. *Id.* at 2185.

103. *Id.* at 2185-87 (Stevens, J., concurring).

104. *Id.* at 2186-88.

strict scrutiny analysis consistent with past development of scrutiny in abortion cases, rather than a less stringent standard of review. Justice Stevens also emphasized the importance of the doctrine of stare decisis in assessing current abortion controversies. He stressed that the precedent set by the line of cases following *Roe* should not be overturned, recognizing that "certain values are more important than the will of a transient majority."[105]

D. Burger's Dissent

Agreeing with much of the dissenting opinions of Justices White and O'Connor, Chief Justice Burger emphasized his feeling that the Court had departed from the limitations expressed in *Roe*.[106] Echoing concerns raised by the dissent in the court of appeals,[107] he found particularly offensive the majority ruling in *Thornburgh* on informed consent, which, in his opinion, was a "simple information dispensing requirement."[108] He also supported the "second physician" requirement, stressing the state interest in "protecting the potentiality of human life."[109] Burger called for "reexamination" of *Roe* because of subsequent overbroad readings of the case, and for judicial restraint to keep judges from " 'roaming at large in the constitutional field.' "[110]

E. White's Dissent

Justice White began his dissent with an attack on the validity of the holding in *Roe* and the development of substantive due process theory in abortion cases. Calling for a major break with the precedent set in this line of cases, White felt that all six of the statutory provisions examined in *Thornburgh* were facially constitutional.[111]

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105. *Id.* at 2188-90. As a justification for the stare decisis doctrine, Justice Stevens stated: "There is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication." *Id.* at 2189.

106. *Id.* at 2190 (Burger, J., dissenting).

107. *Thornburgh*, 737 F.2d at 317-18.

108. *Thornburgh*, 106 S. Ct. at 2190 (Burger, J., dissenting).

109. *Id.* at 2191.

110. *Id.* at 2192 (quoting Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (Harlan, J., concurring)).

111. *Id.* at 2192-93 (White, J., dissenting).

To support his position, White first provided an overview of how substantive protection of a liberty interest as a "fundamental" right had been developed by the Court.[112] He concluded that the right to abortion was not "fundamental" because abortion did not meet the tests established for due process interests, namely, it was neither "implicit in the concept of ordered liberty," nor "deeply rooted in this Nation's history and tradition."[113] He therefore found that the minimum scrutiny or rational basis test was appropriate to use in reviewing the constitutionality of Pennsylvania's abortion statutes, and rejected the majority's "unrestrained imposition of its own, extraconstitutional value preferences" in deciding abortion issues.[114]

White specifically criticized as unworkable *Roe*'s trimester system of viability, with its increasing compelling state interest.[115] The state's interest in protecting the "potential of human life," he maintained, is in the entity of the fetus itself and does not change at the point of viability but is equally compelling throughout the existence of the fetus.[116] He recommended that *Roe* be overruled because abortion is a "hotly contested moral and political issue" which should be resolved by the people through the legislative process, particularly since the Constitution did not adequately address this controversy.[117]

In the second portion of his dissent, White attacked the majority's theoretical justifications used in addressing the six Pennsylvania statutes. He consistently looked for a rational basis in these state statutes under minimal scrutiny to assess

112. *Id.* at 2193-96.

113. *Id.* at 2194-96. Justice White relied upon due process standards developed in Palko v. Connecticut, 302 U.S. 319, 325 (1937), and Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). It should be noted, however, that the *Palko* test was originally used to decide procedural, rather than substantive, due process issues.

114. *Thornburgh*, 106 S. Ct. at 2196 (White, J., dissenting). The use of the term "extraconstitutional" has been defined as "constitutional policy making (by the judiciary) that goes *beyond* the value judgments established by the framers of the written Constitution." M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY ix (1982) (emphasis in original).

115. *Thornburgh*, 106 S. Ct. at 2196-97 (White, J., dissenting).

116. *Id.* at 2197 n.4.

117. *Id.* at 2197-98.

their constitutionality, because his arguments were premised on the belief that a "fundamental" right was not at issue.[118]

In examining the statute concerning "informed consent," White found that the information sought to be communicated would enhance a woman's "freedom of choice by helping to ensure that her decision whether or not to terminate her pregnancy is an informed one."[119] Justice White distinguished the holding of *Akron* by claiming that the information to be communicated under the Pennsylvania statutes was facially relevant and did not reach the level established in *Akron* of a " 'parade of horribles' suggesting that abortion is 'a particularly dangerous procedure.' "[120] He found that even though providing information might result in some women foregoing abortions, this by no means suggested that providing the information was unconstitutional, for the ostensible objective of *Roe* was "not maximizing the number of abortions, but maximizing choice."[121] While he felt the majority was "uninterested in undermining the edifice of post-New Deal constitutional law," he found that strict scrutiny of the informed consent statute "smack[ed] of economic due process rights for physicians."[122]

Justice White also criticized the majority for failing to hold that district court conclusions of fact concerning reporting requirements were erroneous, and for making factual determinations on a record before the Supreme Court consisting only of affidavits and a stipulation of undisputed facts.[123] Turning to substantive analysis of these requirements, he felt that Pennsylvania had established a legitimate goal of advancing medical knowledge by requiring demographic information to be reported. Though he found the required reports to be "fairly detailed,"[124] he thought it was implausible that a particular patient could be identified based on information required under the statute.[125] He therefore concluded that the

118. *Id.* at 2199-200.
119. *Id.* at 2199.
120. *Id.* (quoting *Akron*, 462 U.S. at 444-45).
121. *Thornburgh*, 106 S. Ct. at 2200 (White, J., dissenting).
122. *Id.* at 2201.
123. *Id.* at 2202-03.
124. *Id.* at 2201.
125. *Id.* at 2202-03.

provision was constitutional because it posed little or no threat to a woman's privacy.

In reviewing the physician's duty of care requirement, White accused the majority of resorting to "linguistic nitpicking" to come to a "wholly unreasonable interpretation of the statute."[126] As he construed the statute, it required "only that the risk [to the mother in order to save her viable fetus] be a real and identifiable one" before a method of abortion be abandoned which would most likely result in fetal survival.[127] He was not convinced that a statute was unconstitutional merely because it involved risk to the mother.[128] Since *Roe* recognized a compelling state interest in viable fetuses, he reasoned that "*any* nonnegligible risk of injury" might constitutionally be borne by a woman to protect the life of her viable fetus.[129]

White felt the majority had unfairly held that the "second physician" statute contained no provisions for a medical emergency. He found such a provision in a general clause of an earlier portion of the statutes providing a defense for failure to comply on grounds of medical necessity to preserve maternal life or health.[130]

Justice White concluded with an attack on the majority's decision as "symptomatic of the Court's own insecurity over its handiwork in *Roe* and the cases following that decision," because in *Roe* the Court had "essentially created something out of nothing."[131] He reasoned that the majority had rejected legitimate state regulations because it perceived a "threat to or criticism of the decision in *Roe v. Wade*," and that the indiscriminate striking of Pennsylvania's abortion statutes presented a "warped point of view" on a "tortuous path" tread by the majority.[132]

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126. *Id.* at 2203.

127. *Id.*

128. *Id.* at 2204 (citing Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (constitutional liberty right does not outweigh mandatory vaccination against smallpox, notwithstanding exposure to illness and death)).

129. *Thornburgh*, 106 S. Ct. at 2204 (White, J., dissenting) (emphasis in original).

130. *Id.* at 2205.

131. *Id.* at 2206.

132. *Id.*

F. O'Connor's Dissent

Justice O'Connor's dissent condemned abortion decisions generally as working "a major distortion in the Court's constitutional jurisprudence."[133] As she viewed it, the majority opinion in *Thornburgh* made "it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."[134]

Specifically, Justice O'Connor was concerned by the Court's premature decision of "serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness."[135] Only the question of issuance of a preliminary injunction, in her opinion, was ripe for review, and that issue was controlled by the black letter law recapitulated in *University of Texas v. Camenisch*.[136] Given the district court's findings in the injunction presented in *Thornburgh*, O'Connor found no error or possibility of plaintiff's success on the merits to warrant reversal of the district court's decision. She felt that plenary review by the majority was "unsupported by precedent or logic."[137] O'Connor also felt the majority had set precedent by which

> [p]arties now face the risk that a final ruling on the merits will be entered against them by a court of appeals when an appeal is taken from a grant or denial of a motion seeking a preliminary injunction, although the district court made only an initial assessment of the likelihood that the moving party would succeed on the merits.[138]

Justice O'Connor further suggested that "[i]f this case did not involve state regulation of abortion, it may be doubted that

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133. *Id.* (O'Connor, J., dissenting).

134. *Id.*

135. *Id.* at 2207.

136. 451 U.S. 390, 395 (1981) (noting that "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits").

137. *Thornburgh*, 106 S. Ct. at 2208-09 (O'Connor, J., dissenting). *See also* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (successful motion for preliminary injunction requires a showing that in the absence of its issuance, plaintiff will suffer irreparable injury and that plaintiff is likely to prevail on the merits).

138. *Thornburgh*, 106 S. Ct. at 2213 (O'Connor, J., dissenting).

the Court would entertain, let alone adopt, such a departure from its precedents."[139]

O'Connor then moved from a review of procedural matters to substantive issues, agreeing with Justice White that the Pennsylvania statutes were facially constitutional. Invoking her dissent in *Akron*, which challenged *Roe*'s trimester framework, she found that review of the statutes using a rational relationship test, "with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision,"[140] was appropriate. She stated that the majority in *Thornburgh* "appear[ed] to adopt as its new test a per se rule under which any regulation touching on abortion must be invalidated if it poses 'an unacceptable danger of deterring the exercise of that right.' "[141]

Justice O'Connor did find some first amendment difficulties with the requirement in the "informed consent" statute that information be read aloud to a woman who could not read herself. She felt that such a provision might be construed as invoking a "State ideology."[142] Otherwise, she found the required information rationally related to the state interest of informed consent and protection of human life, especially because the materials would be shown to a woman "only if she [chose] to inspect them."[143] The "reporting requirement" did not, as she viewed it, create "a substantial threat of identification on the face of the statute."[144] Justice O'Connor expressed no opinion on the potential for the physician's viability determination requirements to cause a "trade-off" between the health of the woman and the survival of the fetus, but found no other reason to preliminarily enjoin that statute.[145] She concluded that the majority decisions on these statutes were "bad constitutional law and bad procedural law," creating an "undesired and uncomfortable straightjacket" which "the Court has tailored for the 50 States."[146]

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139. *Id.*
140. *Id.* at 2214.
141. *Id.* (emphasis in original).
142. *Id.* at 2215.
143. *Id.*
144. *Id.* at 2216.
145. *Id.*
146. *Id.*

III. ANALYSIS

Perhaps in response to the strong criticisms leveled at the Court for the lack of constitutional justification in *Roe v. Wade*,[147] the decision in *Thornburgh v. American College of Obstetricians & Gynecologists*[148] is replete with analysis about the proper scope of judicial scrutiny for abortion issues, making its holdings as important for the way in which they frame constitutional issues as for the conclusions reached about abortion. The sharp differences of opinion in *Thornburgh* mark three important trends.

First, the scope of the right to obtain an abortion has again been altered. Without changing the penumbral "privacy" terminology adopted in *Roe*, the majority has expanded the scope of protections afforded to a woman's decision to obtain an abortion. The concurrence suggests that an "autonomy" interest may serve as the basis of this broad abortion right. The dissents are dissatisfied with the results derived from these interpretations, and call for a major re-examination both of the right to abortion as "fundamental" and of the substantive due process scrutiny system used for abortion cases.

Second, the Justices are unable to agree on the proper definition and scope of "fundamental" rights, making a cohesive selection of a proper scrutiny level and resultant resolution of substantive issues almost impossible. As a result, the impact of the Court's "fundamental" right analysis has been diminished as a basis for resolving substantive due process issues. The strong principles articulated in *Thornburgh*, based on amorphously defined penumbral rights and an inconsistently applied scrutiny system, make future use of review standards difficult to discern.

Third, the marked disparities in substantive and procedural precedents which culminate in *Thornburgh* illustrate the need for rearticulation of the strict scrutiny, trimester-based test used by the majority. The seven Justices, holding a fairly uniform interpretation of the right to obtain an abortion in *Roe*, have dwindled to a majority of five in *Thornburgh*, while

147. 410 U.S. 113 (1973). For an example of one such criticism, see Epstein, *supra*, note 21, at 184 ("*Roe v. Wade* is symptomatic of the anlytical poverty possible in constitutional litigation.").

148. 106 S. Ct. 2169 (1986).

support for well-developed, sharply dissenting opinions has grown. Although the compromise necessary to draw sufficient support of a majority of Justices could not be mustered for the rational basis or heightened scrutiny tests articulated in *Thornburgh*, a number of potential alternative scrutiny standards are foreshadowed. An examination of these issues raised by the internal inconsistencies in *Thornburgh* illustrates the immediate need for establishing a consistent, reflective equilibrium in judicial scrutiny of substantive due process rights as they affect abortion issues.

A. Changing the Scope of the Abortion Right

In developing the scope of the right to abortion, the Court began broadly in *Roe*, using strict scrutiny analysis. Subsequent case law, particularly funding cases, sharply curtailed certain aspects of the abortion right. The language of a number of these later cases suggested that the rational or minimal scrutiny standard was appropriate. To justify this change of judicial scrutiny, these cases distinguished between the initial choice to obtain an abortion and the regulation of abortion procedures once that choice had been made.[149]

In *Thornburgh*, this earlier flexibility of conflicting scrutiny standards has been manipulated by the majority to broaden rights, and by the dissent to curtail them. The majority has applied fundamental rights/strict scrutiny analysis in areas previously examined under less intense scrutiny;[150] the dissent uses the least amount of scrutiny possible to undermine the broad right to obtain an abortion altogether.[151]

If commonly held interpretations of the scope of scrutiny existed, it would be improvident to use cases as controlling precedent which applied contrary scrutiny analyses (or a contrary "fundamental" right assessment) to support later decisions. However, in *Thornburgh*, past holdings are used to support issues without regard to the method by which such decisions were justified. The result of these semantic gymnas-

149. *See supra* notes 17-63 and accompanying text.

150. *Compare Thornburgh*, 106 S. Ct. at 2183-84 (second physician requirement held unconstitutional) *with Ashcroft*, 462 U.S. at 482-86 (second physician requirement constitutional under implicit exception).

151. *Thornburgh*, 106 S. Ct. at 2194 (White, J., dissenting).

tics is the articulation in *Thornburgh* of four potential levels of constitutional analysis for substantive due process abortion issues.

1. Strict Scrutiny/Autonomy Interest

At one extreme is Justice Stevens' broadened liberty interest, which concentrates on a woman's ability to choose an abortion. Stevens emphasizes "sensitive areas of liberty,"[152] and "protection of individual autonomy,"[153] calling the abortion decision a "species of 'liberty.' "[154] He carefully preserves "a fundamental and well-recognized difference between a fetus and a human being,"[155] thereby protecting his analysis of the proper scope of the right to obtain an abortion from contradictions which otherwise exist when focusing, as Justice White has, on the compelling state interest in "potentiality of life."

In dealing with difficult abortion issues, Stevens treats the scope of the due process liberty right as broadly as possible, seeking balance on a case by case basis.[156] The "autonomy"

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152. *Id.* at 2186 (Stevens, J., concurring).

153. *Id. See also Roe*, 104 U.S. at 209-15 (Douglas, J., concurring) (articulating scope of constitutional protections arising under fourteenth amendment liberty interest).

154. *Id.* at 2187.

155. *Id.* at 2188.

156. *Id.* at 2189 n.10. Justice Stevens quotes Justice Harlan's famous dissent in Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting):

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. . . . Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision

language used by Justice Stevens suggests a different fundamental basis for the abortion decision in conjunction with the privacy right created in *Roe*.[157] It is possible that Justice Stevens seeks to establish an alternative constitutional basis for the right to obtain an abortion, to counteract the growing strength of dissenting theories, should a situation arise wherein *Roe*'s privacy interest is found inadequate.

2. Strict Scrutiny/Broadened Privacy Interest

As the writer of the majority opinion in *Thornburgh*, Justice Blackmun describes the constitutional right under which the abortion decision is protected as an aspect of "privacy."[158] Only once does he mention the concept of autonomy, and then only as a subspecies of the broader liberty interest:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision — with the guidance of her physician and within the limits specified in *Roe* — whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.[159]

To support the holding that the Pennsylvania abortion statutes were representative of inappropriate and unconstitutional action, Blackmun examined inferences of the legislative purpose gleaned from a review of the history of the statutes.[160] On the basis of that implicit pattern, he overruled all the provisions, at times at the expense of stretching precedent. For

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must take "its place in relation to what went before and further [cut] a channel for what is to come."

Poe, 367 U.S. at 542-44 (Harlan, J., dissenting).

157. *Compare Thornburgh*, 106 S. Ct. at 2185 nn.1-2 *with Thornburgh*, 106 S. Ct. at 2195 n.2. (White, J., dissenting).

158. *Thornburgh*, 106 S. Ct. at 2178 ("constitutional privacy interests"); *see also id.* at 2181 (" The decision to terminate a pregnancy is an intensely private one."); *id.* at 2182 (referring to "personal, intensely private, right" to obtain an abortion).

159. *Id.* at 2184-85 (citations omitted).

160. *Id.* at 2173-74.

example, in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[161] a "second physician" requirement was found constitutional.[162] However, under Blackmun's broadened strict scrutiny test, similar Pennsylvania statutes were found unconstitutional.[163] Though not the extreme per se test feared by O'Connor, Blackmun has framed his analysis using the penumbral right of privacy announced in *Roe*, but has apparently increased the scope of protection available under fundamental right analysis.

3. Rationality/Compelling State Interest

Chief Justice Burger's general call to re-examine *Roe*[164] is magnified by Justice White's specific pronouncements about constitutional scrutiny and the precedent set by *Roe*. Justice White first ascribes broad substantive protections available under the fourteenth amendment and finds the liberty to choose an abortion to be among them.[165] Under past substantive due process case law, where such an interest was found to exist, strict scrutiny was applied.[166] However, White suprisingly concludes that the liberty to obtain an abortion was not so " 'fundamental' that restrictions upon it should call into play anything more than the most minimal judicial scrutiny."[167]

Justice White recognizes "some value of privacy or individual autonomy"[168] — an apparently broad constitutional right — but focuses on language in *Roe* that a woman cannot be "isolated in her privacy"[169] to support regulations which could completely halt the exercise of that right. In selectively applying this language, White ignores *Roe*'s trimester scheme and the fact that in *Roe* the right to obtain an abortion was found to be "fundamental." White is willing to move beyond

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161. 462 U.S. 416 (1983).

162. Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 482-86 (1983).

163. *Thornburgh*, 106 S. Ct. at 2183-84.

164. *Id.* at 2192 (Burger, J., dissenting).

165. *Id.* at 2194 (White, J., dissenting).

166. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

167. *Thornburgh*, 106 S. Ct. at 2194 (White, J., dissenting).

168. *Id.* at 2195 n.2.

169. *Id.* at 2195 (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)).

"'clause-bound' interpretivism"[170] to find implicit rights in the Constitution, but finds no support under the "implicit in the concept of ordered liberty" doctrine articulated generally in due process cases[171] which could apply to abortion itself.

Since Justice White finds the right to choose an abortion protected only if there is no facially legitimate policy supporting state legislation, virtually all of the Pennsylvania statutes would be upheld under his test. Citing the funding cases,[172] he expands their use of rational basis scrutiny to provisions such as Pennsylvania's informed consent statutes which, under earlier precedent would have been strictly scrutinized.[173]

Justice White has taken the flexibility of scrutiny standards used in previous abortion cases and pulled in exactly the opposite direction as Justice Blackmun. White seeks greater justification for constitutional rights than the "something out of nothing" he claims the majority has used to create a fundamental right to obtain an abortion.[174] His test, however, would give the legislature full reign so long as a woman's initial choice is not completely denied.

4. "Undue Burden"/Heightened Scrutiny

Justice O'Connor's "unduly burdensome" test attempts to strike a balance between extremes by narrowing, without completely nullifying, the protection accorded the right to obtain an abortion, which she is willing to support as being "fundamental."[175] She states:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of [compelling state interests, which exist throughout pregnancy, in ensuring ma-

170. *Id.* at 2197 n.5. *See* ELY, DEMOCRACY AND DISTRUST 12 (1980) (analysis of "clause-bound interpretivism" concept).

171. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

172. *Thornburgh*, 106 S. Ct. at 2198 (White, J., dissenting) (citing Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977)).

173. *See Akron*, 462 U.S. at 442-45; Planned Parenthood v. Danforth, 428 U.S. 52, 67-75 (1976) (applying strict scrutiny review of consent provisions).

174. *Thornburgh*, 106 S. Ct. at 2206 (White, J., dissenting).

175. *Id.* at 2214 (O'Connor, J., dissenting).

> ternal health and in protecting potential human life] with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision.[176]

O'Connor's test avoids twisting the already distorted trimester scrutiny framework by calling for a different judicial analysis of abortion issues. However, as her test is currently articulated, the emphasis on compelling state interests throughout pregnancy and deference to legislative enactments could result in a treatment of regulations concerning substantive individual rights similar to the "hands-off" position adopted by the Court for state economic regulations.[177] Moreover, this test further confuses just what protection a "fundamental" right should be afforded.

These positions adopted by the Justices in *Thornburgh* pointedly expose the inchoate nature of the scrutiny rationales devised by the Court. As a result of the Court's inability to adopt a consistent, unified theory about underlying substantive rights, the boundaries of the abortion right have become indefinable.

B. Defining "Fundamental" Rights

A serious byproduct of the confusion about judicial scrutiny of abortion issues is its effect on the framework of fundamental rights analysis itself. *Thornburgh* has painfully illustrated the linguistic impasse created by altering the definition of fundamental rights to support outcomes on various substantive issues.

The Court has previously found a core of fundamental rights based on express provisions in the Constitution and has expanded the scope of these rights via implications of constitutional provisions.[178] However, since it has failed to reach a consensus on the scope of fundamental rights and a consistent perspective from which they are to be assessed, subsequent interpretational differences were inevitable, particularly for issues based on the broad penumbral right of personal privacy.

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176. *Id.* (attributing development of this standard to funding and consent cases using "unduly burdensome" language).

177. *See supra* note 11 and accompanying text.

178. Griswold v. Connecticut, 381 U.S. 479, 481-85 (1965); *but see Roe*, 104 U.S. at 173-74 (Rehnquist, J., dissenting) (notes problems created when fundamental right analysis is applied to substantive due process issues).

Ideally, *Thornburgh* should have been a determination of whether the right to obtain an abortion under various circumstances is constitutionally protected based on a commonly held test for assessing "fundamental" rights. Instead, the Court in *Thornburgh* has lost credibility because it has not functioned consistently or cohesively in making this crucial, underlying assessment. Seemingly sound standards of scrutiny have fallen short as means of analysis. At the base of this problem is the lack of consensus as to whether abortion matters should be examined as subspecies of protected due process rights or as individual acts to which fundamental rights analysis is then applied.

Justice White, for example, details past justifications used by the Court to establish an appropriate level of judicial scrutiny.[179] Applying the tests used to establish a right as "fundamental," White finds that abortion is neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and tradition."[180] He focuses, not as the majority did on the right to obtain an abortion as an aspect of the right of privacy, but on the very narrow examination of the act of abortion alone. As a result, he readily concludes that there is no basis under substantive due process tests to support a fundamental right to abortion. Justice Blackmun applies the same fundamental rights analysis, but looks at the right to obtain an abortion as a part of a much broader interest in "privacy." He, therefore, draws just the opposite conclusion: few decisions are more fundamental than an individual's control over her own body, including the ability to end a pregnancy.[181] That both apply a seemingly identical fundamental rights analysis, yet reach diametrically opposed conclusions, illustrates the growing problem stemming from inconsistencies among the individual Justices' perceptions of how fundamental rights should be derived and articulated.

Moreover, in *Thornburgh*, the majority appears to have rushed to examine difficult abortion issues — possibly at the expense of the impact this case was intended to have. The

179. Thornburgh v. American College of Obstetricians & Gynecologists, 106 S. Ct. 2169, 2194-96 (White, J., dissenting).

180. *Id.* at 2195-96.

181. *Thornburgh*, 106 S. Ct. at 2185.

merits of *Thornburgh* were addressed only after substantial manipulation of usual appellate practice.[182] Standing alone, this would warrant concern. Viewed together with sharply differing opinions on interpretational issues and the breadth with which the majority has applied substantive concepts, it signals an undue urgency to clarify holdings articulated in *Roe* rather than to apply well-defined judicial scrutiny to a ripe controversy.

The interpretivist charge that substantive due process is merely a device to justify personal or political opinions on strongly contested moral issues[183] obtains greater credence when scrutiny rationales appear to be arbitrarily applied to reach a certain substantive result. The quantum leaps in substantive and procedural reasoning weaken the precedential value of *Thornburgh*. This problem cannot be resolved unless the Court can agree upon the "fundamental" nature of an individual's right to obtain an abortion and the appropriate scrutiny of that action.

C. *Proposed Scrutiny Scheme for Abortion Issues*

The time has come, not to overturn the holding in *Roe*, but to establish a consistent theoretical basis for the substantive protections of the right to obtain an abortion. The only current proposal for rearticulation, however, is Justice O'Connor's "unduly burdensome" test, and as she presently interprets abortion issues, it is unlikely that this test would be adopted unless stronger protection of the right to obtain an abortion is made. As she applies her test, so much deference is given to the legislature that the "burdensome" standard would operate as a de facto rational basis test.

Notwithstanding this problem, Justice O'Connor's criticism of the static trimester-based scrutiny scheme remains persuasive.[184] *Roe*'s trimester system should be abandoned because it will continue to grow more inaccurate as medical technology improves and viability of a fetus can be sustained

182. *Id.* at 2175-77, 2206-13 (O'Connor, J., dissenting).

183. R. BERGER, GOVERNMENT BY JUDICIARY (1977).

184. *See* Comment, *The Trimester Approach: How Long Can the Legal Fiction Last?*, 35 MERCER L. REV. 891 (1984); Comment, *Technological Advances and* Roe v. Wade*: The Need to Rethink Abortion Law*, 29 UCLA L. REV. 1194 (1982).

at an increasingly earlier time. Still, the substantive protections of a woman's fundamental right to control her own body by obtaining an abortion should be protected. To do this, the basis of the right to obtain an abortion should be changed to more accurately reflect the true nature of the individual rights, state interests, and potential medical advancements involved. A more functional standard could be created using the most logical aspects of the Justices' arguments in *Thornburgh*.

First, rather than solely applying *Roe*'s ill-defined and arguably limited right of "privacy," the test for abortion issues should be based primarily on a fundamental liberty interest of autonomy as suggested in Justice Stevens' *Thornburgh* concurrence. This concept of autonomy more accurately defines the kind of control of a person's physical and emotional being concerning procreative issues that is truly being protected under the fourteenth amendment and the Bill of Rights.[185] The scope of the right of reproductive autonomy should be such that, with the exception of certain limitations tied to fetal viability described hereafter, the state could neither impinge on the decision to obtain an abortion nor could it compel a woman to end a pregnancy if she did not freely choose to do so. It is this kind of control over bodily processes and personal decision-making which has been found integral to the Bill of Rights.[186]

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185. In Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), the Court recognized "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis in original). *See also Thornburgh*, 106 S. Ct. at 2185, 2186, 2195, 2198, 2200 (references to a right of personal or individual autonomy); Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375 (1985); Schnably, *Normative Judgment, Social Change, and Legal Reasoning in the Context of Abortion and Privacy*, 13 N.Y.U. REV. L. & SOC. CHANGE 715, 772-75 (1985).

186. The due process clause of the fourteenth amendment forbids any state to "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. *See also Thornburgh*, 106 S. Ct. at 2186 (Stevens, J., concurring) ("The aspect of liberty at stake in this case is the freedom from unwarranted governmental intrusion into individual decisions in matters of childbearing."); Whalen v. Roe, 429 U.S. 589, 589-600 (1977) (independence in making personal decisions); Loving v. Virginia , 388 U.S. 1 (1967) (freedom to marry); Schmerber v. California, 384 U.S. 757, 767 (1966) (overriding constitutional protection of "personal privacy and dignity against unwarranted intrusion"); *Griswold*, 381 U.S. 479, 484 (1965) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)) ("zone" of privacy exists which protects "the sanctity of a [person's] home and the privacies of life"); Poe v. Ullman, 367 U.S. 497,

Second, the state interest in a fetus should be found to be compelling only after the fetus has become "viable." The definition articulated in *Roe*, namely, that the fetus has the "capability of meaningful life outside the mother's womb"[187] should be used as the standard for assessing viability. This distinction would eliminate problems created by the amorphous language abstracted from *Roe* in subsequent dissenting opinions which sought to define "viability" under a subjective "potentiality of life" standard,[188] rather than under the more concrete, objective "capability" test. This "capability" test would uphold the substantive principles articulated in *Roe* and yet avoid technical inaccuracies as medical advances are made which could place viability of the fetus at a time earlier than an arbitrary trimester mark.

The result of these changes would be the formation of a bi-level test for abortion issues. This analysis would call for strict scrutiny of abortion statutes from the time of conception until the time a fetus is able to survive outside the womb. At the point at which a fetus is viable and until a fetus, by birth, becomes a separate, legal "person" under the law,[189] a heightened scrutiny test, reflecting an increased state interest in that viable entity, would be applied. In the first level of this test, encompassing the moment of conception until the time of viability, a woman's right to control her body when a fetus is not capable of separate existence would be "fundamental" under the due process protections of the fourteenth amendment's lib-

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543 (1961) (Harlan, J., dissenting) ("'liberty' is not a series of isolated points, . . . [i]t is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints"); United States v. Gruenewald, 233 F.2d 556, 581-82 (1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1956) (protection of individual's substantive right to a "private enclave where he may lead a private life"); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right of procreation); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (not merely freedom from bodily restraint but also the right generally to enjoy those privileges "essential to the orderly pursuit of happiness").

187. Roe v. Wade, 410 U.S. 133, 163 (1973).

188. *See, e.g.*, Colautti v. Franklin, 439 U.S. at 401-07 (White, J., dissenting); *Thornburgh*, 106 S. Ct. at 2196-97 (White, J., dissenting).

189. For a discussion of the legal definition of "person" in the contexts of prenatal death and abortion, see Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639, 656-58 (1980). For a review of constitutional difficulties in attempting to call a fetus a "person," see *Roe*, 410 U.S. at 157-59; *Thornburgh*, 106 S. Ct. at 2188 n.8 ("No member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment.").

erty interests of individual privacy[190] and reproductive autonomy.

The state interest in the health of the woman would continue to exist throughout pregnancy. Health concerns have been considered valid state interests long before abortion was addressed by the Supreme Court.[191] However, in applying strict scrutiny, a state could neither use this interest in health to curtail the right to obtain an abortion, which would remain freely fundamental, nor create regulations which would directly impinge on the autonomous choice to obtain an abortion.

Under strict scrutiny balancing, a woman's rights would outweigh the state's interest where individual privacy and reproductive autonomy was curtailed. For example, collecting extremely detailed statistical data which impinged upon a woman's privacy rights of secrecy, solitude or anonymity, would

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190. It should be noted that the privacy interest suggested in this proposed test is not of the same scope as that originally articulated in *Roe* and used in subsequent abortion decisions. The difficulties resulting from the use of *Roe*'s overbroad right of privacy can be traced to several sources. First, Warren and Brandeis' article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), which popularized the notion that a privacy interest could be actionable, created later problems because of the breadth with which it described privacy. *See* Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. REV. 233 (1977).

Later, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court skewed the use of the privacy right by giving it a penumbral basis and by its description of the right to use contraceptives as a protection of the "sacred precincts of marital bedrooms." *Id.* at 485. The fortuitous word choice for describing this affront to a person as an intrusion into the physical space where that protection would most likely be sought, namely, a marital bedroom, was linked to "privacy." This privacy language necessarily became the focal point when the subject matter shifted from contraceptive use to that of the right to abortion. With it came the attendant difficulties of using a term which has been further broadened by use in a wide variety of disparate contexts. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (defamation); Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977) (statistical compilation of persons using prescription drugs); Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 248 (1973) (Powell, J., concurring in part and dissenting in part) (desegregation of schools).

Any reference to a fundamental, actionable liberty interest in privacy in this proposed test for abortion issues is intended to be limited in scope to the protection of the rights of "secrecy, solitude and anonymity" suggested by Gavison in her article, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980), as well as her related concept of protection against "accessibility." *Id.* at 433-36. By way of contrast, Gavison has defined "autonomy" as "the capacity to make an independent moral judgment, the willingness to exercise it, and the courage to act on the results of this exercise even when the judgment is not a popular one." *Id.* at 449. Both privacy and autonomy concepts as articulated by Gavison are important in assessing the scope of the right of persons to control what happens to their physical being, including the right to obtain an abortion.

191. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982) and cases cited therein.

be unconstitutional. Requirements such as those contained in the Pennsylvania statutes in *Thornburgh* which allowed public inspection of records,[192] would also be inappropriately coercive because the resultant loss of privacy would detrimentally impact on the capacity to make autonomous moral judgments.

In the second level of this test, balancing of state regulations would be made, from the time a fetus is determined to be viable, where a woman's right to abortion is unduly burdened. The state interest in a viable fetus would justify increased intrusion in the processes used to obtain an abortion as long as the right itself is not curtailed.[193] Under this level of scrutiny, for example, medical regulations which would require a second physician to be present to care for an aborted viable fetus would be constitutional where they expressly provided a medical emergency exception. A woman's life and/or health could be unduly burdened by the confusion arising from a less detailed regulation; therefore, it would fail to meet heightened scrutiny requirements.

An example of a statutory provision which would be prohibited because of overbreadth is one requiring a fixed litany of information to be conveyed to a woman prior to receiving her consent for an abortion. Since the need for information may differ radically from woman to woman, a simple requirement that "informed consent" be obtained would protect the state's interests while not unduly burdening or biasing a woman's autonomous decision-making process.

It should be noted that under heightened scrutiny analysis, the method of abortion might be differently regulated when a fetus is viable. For instance, a saline amniocentesis procedure sought to be used after the point of viability would have to be balanced with the state's compelling interest in the fetus. As a result, if an alternative means of abortion would not unduly burden a woman's right to actually obtain an abortion and would result in a greater chance of fetal survival, that method could be legislatively mandated.

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192. *Thornburgh*, 106 S. Ct. at 2182-83.

193. If medical technology improved to such a degree that a fetus could be viably maintained outside the womb from the moment of conception, the logical result would be that the heightened scrutiny test would completely supplant proposed first level strict scrutiny review.

These examples are not intended to be all-inclusive, but rather to illustrate the benefits which may be obtained from a modification of the Court's present test. Of crucial importance in any refinement of due process analysis in this area will be the ability to adapt to technological advancements while still protecting the essential right of women to personal privacy and reproductive autonomy.

IV. CONCLUSION

Unlike the blatantly unconstitutional statutes analyzed in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[194] the provisions examined in *Thornburgh v. American College of Obstetricians & Gynecologists*[195] provide an example of more subtle, less facially intrusive statutes. They are nearer to constitutional goals, yet still place an unacceptable burden on individual rights. Unfortunately, the contradictions inherent in the mixed use of scrutiny levels and inconsistent perceptions of constitutional rights divided the *Thornburgh* Court at a very basic level. Disagreement as to definition and scope of fundamental right analysis has greatly diminished the precedential impact of this case for resolving abortion issues and illustrates the confusion arising from the Court's manipulation of scrutiny levels for substantive due process cases generally.

What is needed is a consistent, commonly-held scrutiny scheme which will not jeopardize substantive rights already protected. Justice O'Connor's proposed "unduly burdensome" test accords less protection of the right to abortion than should be conceded, but this attempt to find a solid constitutional theory which does not ignore medical advances is the direction in which the Court should move. A test which is premised upon fundamental liberty interests in individual privacy and reproductive autonomy, which rejects an arbitrary trimester system, and which adopts a definition of "viability" restricted to "capability of meaningful life," will allow the Court to reinforce the fundamental rights of a woman to obtain an abortion without requiring the Court to make con-

194. 462 U.S. 416 (1983).

195. 106 S. Ct. 2169 (1986).

flicting or overreaching procedural and substantive pronouncements.

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